

6-3-1975

Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al v. Morris Stephens, et al and Morris Stephens, et al v. Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al

Brief 1975-SC-1050

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

 Part of the [Courts Commons](#)

Repository Citation

1975-SC-1050, Brief, "Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al v. Morris Stephens, et al and Morris Stephens, et al v. Commonwealth of Kentucky, ex el, Department for Natural Resources and Environmental Protection, et al" (1975). 1970-1979. 261.
https://uknowledge.uky.edu/ky_appeals_briefs70s/261

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1975-SC-1050-04

{E4CEF51C-4ACE-46EB-9110-39F5215EABD6}
{135167}{54-131008:103752}{060375}

BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1050, 75-1099, 75-1177

MORRIS STEPHENS, ET AL CROSS-APPELLANTS

**VS. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE**

**COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL
PROTECTION, ET AL CROSS-APPELLEES**

**BRIEF FOR CROSS-APPELLEES
COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL
RESOURCES AND ENVIRONMENTAL
PROTECTION**

**ROBERT F. STEPHENS
Attorney General
Commonwealth of Kentucky**

**By: ALAN L. HARRINGTON
Special Assistant Attorney General
5th Floor Capital Plaza
Frankfort, Kentucky 40601**

FILED

JUN 3 1975

**MARTHA LAYNE COLLINS
CLERK
SUPREME COURT**

**DEPARTMENT FOR
NATURAL RESOURCES
AND ENVIRONMENTAL
PROTECTION**

OFFICE OF GENERAL COUNSEL

**By: ALAN L. HARRINGTON
5th Floor Capital Plaza
Frankfort, Kentucky 40601**

(Certificate of Service on inside of front cover)

CERTIFICATE OF SERVICE

I hereby certify that the herein BRIEF FOR CROSS-APPELLEES was mailed, postage prepaid, to the Honorable J. B. Johnson, Sr., Williamsburg, Kentucky, 40769, the Honorable Homer Ramsey, Whitley City, Kentucky, 42653, Attorneys for the Cross-Appellants, the Honorable A. Robert Doll, and Ronald D. Ray, Greenebaum, Doll, Matthews, and Boone, 3300 First National Tower, Louisville, Kentucky 40202, the Hon. Lively M. Wilson, and Winfrey P. Blackburn, Jr., Stites, McElwain and Fowler, 3400 First National Tower, Louisville, Kentucky 40202, Amicus Curiae Counsel, and the Honorable Squire N. Williams, Jr., Circuit Judge, Franklin County Courthouse, Frankfort, Kentucky, 40601, this the 3rd day of June, 1976.

A handwritten signature in cursive script, reading "Alan L. Harrington", written over a horizontal line.

ALAN L. HARRINGTON

Special Assistant Attorney General

TABLE OF CONTENTS AND AUTHORITIES

Page

STATEMENT OF THE QUESTIONS PRESENTED	1-2
---	-----

STATEMENT OF THE CASE	2
-----------------------------	---

KRS CHAPTER 146	2
-----------------------	---

ARGUMENT I	3-4
------------------	-----

THE OVERRULING OF CROSS-APPELLANTS MOTION TO DISMISS WAS PROPER INASMUCH AS THE CONSTRUCTION OF KRS 146 AND THE RIGHTS, DUTIES, AND OBLIGATIONS THERE- UNDER WERE AT ISSUE AND WERE STILL TO BE DETERMINED BY THE COURT	3
--	----------

KRS 146.200	3
-------------------	---

KRS 146.990	3, 4
-------------------	------

ARGUMENT II	4-5
-------------------	-----

THE PROCEDURES OUTLINED IN KRS 146.270 ARE MERELY ADMINISTRATIVE OUTLINES OF WILD RIVER MANAGEMENT AND IN NO WAY AFFECT THE ENFORCEMENT POSTURE OF THE DEPARTMENT RELATING TO PROHIBITED ENVIRONMENTAL ACTIVITIES WITHIN THE CONFINES OF A DESIGNATED WILD RIVER AREA	4
--	----------

KRS 146.270	4
-------------------	---

**TABLE OF CONTENTS
AND AUTHORITIES (Continued)**

	Page
KRS 146.350	5
KRS 146.990	5
ARGUMENT III	5-6
ALL PROCEDURES CARRIED OUT BY THE COMMONWEALTH INCIDENTAL TO OBTAINING INJUNCTIVE RELIEF AGAINST CROSS-APPEL- LANTS WERE PROPER AND IN CONFORMITY WITH LAW -----	5
KRS 146.990	6
C.R. 65.03	6
C.R. 65.04	6
CONCLUSION	6-7
KRS 146.270	7

SUPREME COURT OF KENTUCKY

FILE NO. 75-1050, 75-1099, 75-1177

MORRIS STEPHENS, ET AL CROSS-APPELLANTS

**VS. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE**

**COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL
PROTECTION, ET AL CROSS-APPELLEES**

**BRIEF FOR CROSS-APPELLEES
COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL
RESOURCES AND ENVIRONMENTAL
PROTECTION**

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I

**DID THE TRIAL COURT ERR IN DENYING CROSS-
APPELLANTS MOTION TO DISMISS THE COMMON-
WEALTH'S COMPLAINT IN THE ABSENCE OF IM-
MEDIATE CONDEMNATION PROCEEDINGS ON THE
PART OF THE STATE?**

II

DID THE TRIAL COURT ERR IN FAILING TO FIND THE COMMONWEALTH IN NON-COMPLIANCE WITH THE MANAGEMENT PROCEDURES OUTLINED IN KRS 146.270?

III

DID THE TRIAL COURT ERR IN FAILING TO FIND THE COMMONWEALTH HAD OBTAINED INJUNCTIVE RELIEF AGAINST CROSS-APPELLANTS IN CONTRAVENTION OF APPLICABLE PROCEDURAL RULES?

STATEMENT OF THE CASE

This cross-appeal arises from the entry in the Franklin Circuit Court of an Opinion and Final Judgment which declares KRS Chapter 146, the "Wild Rivers Act", to be constitutional, but requires the Commonwealth to proceed to compensate a landowner "immediately upon the Commonwealth obtaining an injunction prohibiting use of any land in contravention of the Wild Rivers Act."

The Appellees have filed a cross-appeal specifying alleged errors made by the trial court pursuant to the court's ultimate determination of the issues raised by the case. The Commonwealth maintains, however, that all alleged errors raised by the Cross-Appellants in their cross-appeal are without merit and as such should be disposed of accordingly by this Court.

ARGUMENT I

THE OVERRULING OF CROSS-APPELLANTS MOTION TO DISMISS WAS PROPER INASMUCH AS THE CONSTRUCTION OF KRS 146 AND THE RIGHTS, DUTIES, AND OBLIGATIONS THEREUNDER WERE AT ISSUE AND WERE STILL TO BE DETERMINED BY THE COURT.

The trial court's action in overruling Cross-Appellants' motion to dismiss Cross-Appellees' Complaint was a proper exercise of judicial power consistent with all appropriate procedures of law.

KRS 146.990 states in part that:

Any person, corporation, . . . or other governmental subdivision who violates any of the provisions of KRS 146.200 to 146.350 . . . may be enjoined from continuing said violation.

Pursuant to this legislative mandate it was incumbent upon the Department to take immediate action to facilitate the cessation of all environmentally oriented activities in the area in question.

In the course of the initial action taken by the Commonwealth to prevent further degradation to the environment the issue as to *when* and *if* compensation was mandated by the statute had not yet been determined by the trial court. Thus it does not follow that the Department was statutorily required to commence condemnation proceedings when the Commonwealth felt no compensable proceedings were necessitated within the meaning of the

Act and no judicial determination had been made relative to the compensation issue.

The Department, however, was statutorily directed by KRS 146.350 and KRS 146.990 to enforce the Act through injunctive relief, if necessary, in order to facilitate the Legislature's purpose. This the Commonwealth did within the confines of appropriate procedural process.

ARGUMENT II

THE PROCEDURES OUTLINED IN KRS 146.270 ARE MERELY ADMINISTRATIVE OUTLINES OF WILD RIVER MANAGEMENT AND IN NO WAY AFFECT THE ENFORCEMENT POSTURE OF THE DEPARTMENT RELATING TO PROHIBITED ENVIRONMENTAL ACTIVITIES WITHIN THE CONFINES OF A DESIGNATED WILD RIVER AREA.

KRS 146.270 indicates procedures and processes by which an overall Wild River management plan may be coordinated consistent with the purpose of the Act. KRS 146.270 states in part:

The secretary shall develop a management plan for a designated stream area and record the views expressed on each plan developed.

It thus seems apparent that the Act contemplates an input of ideas by interested parties into any management plan which may be developed by the Department with respect to a designated stream area.

However, the procedures indicated in KRS 146.270 are not *limitations* on the enforcement powers of the Act

contained in KRS 146.350 and KRS 146.990, but are merely methods and means of more fully administering the Wild River System.

The Commonwealth, therefore, was not required to affirmatively and specifically *plead* that certain administrative functions *incidental* to a proposed management plan had been fully complied with *before* the Department could take effective legal action to prevent environmental damage.

To accept Cross-Appellants position would mean that injunctive relief would not be available to the Commonwealth to prevent unauthorized operations without *first* having fully promulgated an overall management plan for the area in question.

Consistent with Cross-Appellants' view, the designated area could be completely decimated while the Department was attempting to obtain an input of ideas from interested persons as to their feelings and inclinations relative to a proposed management plan. Such construction of the statute would successfully emasculate the intent and purpose of the Legislature, namely the protection and preservation of the established wild river areas.

ARGUMENT III

ALL PROCEDURES CARRIED OUT BY THE COMMONWEALTH INCIDENTAL TO OBTAINING INJUNCTIVE RELIEF AGAINST CROSS-APPELLANTS WERE PROPER AND IN CONFORMITY WITH LAW.

The Cross-Appellees alleged in their Complaint that

injunctive relief was mandated by KRS 146.990 and that the Commonwealth had no other adequate remedy at law, thereby indicating that the movant would suffer immediate and irreparable injury. The mere absence of the words "immediate and irreparable injury, loss, or damage" is not fatal in attempting to procure injunctive relief.

Rules 65.03 and 65.04 of the Kentucky Rules of Civil Procedure require a verified complaint or affidavit to show "that the applicant's rights are being violated . . . and the applicant will suffer immediate and irreparable injury, loss, or damage"

Accordingly, a cursory examination of the Cross-Appellees' Complaint in this matter reveals the presence of that information required by Rule 65.03 and 65.04 before injunctive relief may be obtained.

Cross-Appellants' assertions that the Secretary failed to request injunctive relief in the proper manner is without merit. Counsel for the Department was duly designated a Special Assistant Attorney General by the then Attorney General Ed Hancock. Pursuant to that designation counsel for the Department brought the action in question upon request of the Secretary as indicated by the Commonwealth's Complaint.

CONCLUSION

The Department asserts that the trial court was correct in its ruling on those points raised by Cross-Appellants in their Cross-Appeal.

For the above stated reasons the Cross-Appellees

respectfully request this Court to sustain the following trial court determinations:

Overruling Cross-Appellants' motion to dismiss;
Obviating the necessity of compliance with KRS
146.270 as a pre-condition to enforcement action;
and Compliance by the Commonwealth with all necessary requirements incidental to obtaining injunctive relief against Cross-Appellants.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
Commonwealth of Kentucky

By: ALAN L. HARRINGTON
Special Assistant Attorney General
5th Floor Capital Plaza
Frankfort, Kentucky 40601

DEPARTMENT FOR
NATURAL RESOURCES
AND ENVIRONMENTAL
PROTECTION

OFFICE OF GENERAL COUNSEL

By: ALAN L. HARRINGTON
5th Floor Capital Plaza
Frankfort, Kentucky 40601